Court of Appeals, State of Michigan

ORDER

People of MI v David Quintrell Givhan

Docket No. 264708

LC No. 05-000299-FH

Karen M. Fort Hood
Presiding Judge

Michael R. Smolenski

Christopher M. Murray
Judges

The Court, on its own motion, amends the first paragraph of its February 15, 2007 opinion to reflect that defendant was sentenced to 2 to 10 years imprisonment ~~for~~ his CCW and felon-in-possession convictions.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 21 2007
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID QUINTRELL GIVHAN,

Defendant-Appellant

UNPUBLISHED
February 15, 2007

No. 264708
Kalamazoo Circuit Court
LC No. 05-000299-FH

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227, possession of a firearm as a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a habitual offender, third offense, MCL 769.11, to 15 to 40 years' imprisonment for his CCW and felon-in-possession convictions, and to two years' imprisonment for his felony-firearm conviction. He now appeals as of right. We reverse defendant's conviction and sentence for carrying a concealed weapon but affirm his convictions and sentences in all other respects.

Defendant and several other occupants of a vehicle were arrested by police responding to a 911 emergency call concerning suspicious activity in the vehicle. An unidentified resident of an apartment complex telephoned 911 at approximately 3:00 a.m. to report that he could see several people examining a handgun under the dome light of the vehicle, which was parked in the complex's parking lot. Defendant and one of his passengers, Josiah Preston, exited the vehicle after police arrived. Police observed Preston attempt to hide a fully-loaded, semi-automatic handgun under the tire of the vehicle. Defendant was observed kneeling in front of a nearby car, under which police subsequently found a fully-loaded, assault-style shotgun.

Defendant's first claim on appeal is that the admission of trial testimony summarizing the contents of the 911 telephone call violated his Sixth Amendment right to confront all witnesses against him. Defendant did not raise this issue of alleged constitutional error below and therefore it is unpreserved on appeal. *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004). An unpreserved constitutional error is reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The United States Supreme Court recently clarified "when statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' and thus subject to

the requirements of the Sixth Amendment's Confrontation Clause." *Davis v Washington*, ___ US ___; 126 S Ct 2266, 2270; 165 L Ed 2d 224 (2006). *Davis* holds that most statements to 911 operators do not meet the definition of "testimonial," as defined by the Court in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). *Davis, supra* at 2273.

In *Davis*, the Court announced, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis, supra* at 2273. In contrast, where there is no ongoing emergency, statements in response to police interrogations about a past event are testimonial if they are made for the primary purpose of establishing facts relevant to a later criminal prosecution. *Id*. at 2274. The Court analyzed a case in which a woman telephoned 911 but hung up before making a statement. The operator reversed the call and directed the woman to answer the questions posed to her. *Id*. at 2271. The complainant provided the operator with the name and other identifying information of her boyfriend, who was in her home in violation of a domestic no-contact order. *Id*. At the subsequent trial of the boyfriend, the complainant did not testify and a recording of her 911 call was admitted over the objection of the defendant. *Id*. On review, the Court found that the admission of the 911 recording did not violate the Confrontation Clause because the primary purpose of the call, to describe an imminent danger, was entirely distinct from the purpose of giving courtroom testimony. *Id*. at 2277.

Although, the *Davis* Court recognized that a 911 call could evolve into an interrogation of the caller and thus result in testimonial evidence, *id*. at 2277, there is no indication in this case that the 911 caller went beyond providing the information necessary to explain the threat to the police and direct them to the location. Therefore, whether the caller offered the statement about the gun spontaneously or in response to directed questions from the operator is irrelevant. *Id*. at 2274 n 1. The timeline of the perceived emergency was well-established. The suspicious vehicle was still at the apartment complex when officers reported to the scene. Clearly, the threat that prompted the anonymous resident to seek police assistance was ongoing as long as the occupants of defendant's vehicle remained on the premises and in possession of two assault weapons. We find that, like the declarant in *Davis*, the 911 caller here "was speaking about events as they were actually happening rather than describing past events." *Id*. at 2276. Consequently, the admission of the police officer's testimony describing the call did not violate defendant's constitutional right of confrontation.

Defendant next argues that the prosecutor committed intentional prosecutorial misconduct by repeating a hearsay statement made by another occupant of the vehicle during cross-examination of defense witness Preston. We agree that the question was improper, but conclude that it does not require reversal of defendant's convictions.

On cross-examination of Preston, the prosecutor posed the following question regarding Odell Sutton, another passenger in defendant's car: "Okay. And would it surprise you that he acknowledged that he saw the gun in the car that night?" After trial counsel objected and asked for the question to be stricken from the record, the prosecutor withdrew the question. The trial court immediately gave a curative jury instruction. Subsequently, the trial court gave the general instruction that the lawyer's questions are not evidence.

Preserved allegations of prosecutorial misconduct are reviewed de novo to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). When reviewing a claim of prosecutorial misconduct, this Court examines the pertinent portion of the record and evaluates a prosecutor's remarks in context. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). However, a prosecutor is "entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

We find it unnecessary to determine whether the prosecutor acted in good faith, because any prejudice caused by the improper question was cured by trial counsel's immediate objection, the withdrawal of the improper question, and the trial court's curative jury instruction. A preserved, nonconstitutional error does not warrant reversal of a defendant's conviction unless after an examination of the entire cause, it affirmatively appears that the error more probably than not was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *Id*. at 493. In the context of this case, it does not affirmatively appear that the prosecutor's question was more probably than not outcome determinative. The prosecutor did not indicate that Sutton said defendant carried the shotgun. She only imparted that Sutton saw the gun in the car. We find that the only adverse effect of the prosecutor's question was to undermine the already implausible theory that someone other than the occupants of defendant's vehicle placed the shotgun under another vehicle in the parking lot. The evidence presented at trial established that defendant was the only person observed moving west of the vehicle subject to investigation. The shotgun was subsequently found in the area where defendant went. Moreover, there was very strong circumstantial evidence that defendant moved the shotgun to that location based on the police officer's testimony that they found the shotgun under the same car where they had earlier observed defendant kneeling and pushing an object that made a metallic sound.

In reaching our conclusion, we note that this Court presumes that juries follow their instructions "until the contrary is clearly shown." *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). Here, there is no evidence that the jury ignored the trial court's curative instruction. Consequently, our review of the record satisfies us that the challenged prosecutorial question, which was isolated, in an otherwise proper cross-examination, does not require reversal of defendant's conviction.

Defendant's third issue on appeal is that he was improperly convicted for CCW under MCL 750.227 because the weapon he was accused of carrying was a shotgun, not a pistol. In reviewing a sufficiency of the evidence question, this Court views the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

Here, the prosecution concedes that the shotgun does not fall within the statutory definition of a "pistol," under MCL 750.227(2), but it argues that defendant was properly charged with carrying a "dangerous weapon" under MCL 750.227(1). This argument is directly

contradicted by our Supreme Court's decision in *People v Smith*, 393 Mich 432; 225 NW2d 165 (1975), where the Supreme Court held that an M-1 rifle was not the sort of dangerous weapon contemplated by § 227(1). The *Smith* Court reasoned that the rule of ejusdem generis limited the application of the subrule to the weapons enumerated and to other "stabbing" weapons. *Id*. The Court acknowledged that the Legislature's use of the narrow term "pistol" under MCL 750.227(2) excluded other firearms that would undoubtedly fit the definition of a "dangerous weapon." *Id*. However, the Court concluded that the Legislature must have intended for the carrying of long-barreled firearms to be prosecuted under statutory provisions containing additional elements, such as carrying a firearm or dangerous weapon with unlawful intent, MCL 750.226. *Id*. at 437-438. The Court held that "[t]he prohibition against carrying long barreled firearms does not reasonably belong in a 'concealed' weapons class of crimes." *Id*. at 437. See, also, *People v Jacques*, 456 Mich 352, 355-356; 572 NW2d 195 (1998); *People v Diericks*, 60 Mich App 603, 604; 231 NW2d 422 (1975).

We note that, although *Smith* interpreted a predecessor statute, the current statute is similar in all material respects. Therefore, MCL 750.227(1) was not a viable means of charging defendant. For that reason, the evidence against defendant was insufficient to support a conviction under MCL 750.227, and his conviction must be reversed.

Finally, defendant claims on appeal that his trial attorney failed to provide him with effective assistance of counsel. Because defendant failed to move the trial court for a new trial or *Ginther* hearing,[1] our review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). We address de novo the constitutional question whether defendant's right to effective assistance was violated. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. *Strickland, supra* at 687. To demonstrate prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra* at 694.

First, defendant's argument that he was denied effective assistance of counsel because his trial counsel failed to object to the officer's testimony describing the anonymous 911 call must fail. As discussed above, there is no reasonable probability that an objection on Confrontation Clause grounds would have changed the outcome of the proceedings below. Because the content of the 911 call was a nontestimonial statement, its admission at trial was proper. *Davis, supra* at 1273. Thus, defendant cannot show that trial counsel's failure to object fell below an objective standard of reasonableness. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (Defense counsel is not ineffective for failing to make meritless objections).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Likewise, defendant has failed to establish that his counsel had an actual conflict of interest that rendered his assistance ineffective. See *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Michigan Court Rule 6.005(F) establishes a procedure for a trial court to follow in cases of multiple representation by a retained attorney. MCR 6.005(F) provides:

> Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer . . . , the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:
>
> (1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;
>
> (2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and
>
> (3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

Defendant's claim lacks merit. First, it is apparent from the record that MCR 6.005(F) was inapplicable because defendant and his uncle were not "defendants who have been jointly charged or whose cases have been joined." MCR 6.005(F)(1). Indeed, defendant concedes on appeal that MCR 6.005(F) does not expressly apply to these facts. Second, even if the rule were applicable, it was satisfied. At trial, counsel stated on the record that he represented defendant's uncle on an unrelated matter and that a potential conflict would arise if and when new charges were brought against defendant. Defendant thereafter indicated his desire to proceed with his retained counsel and the trial court found that there was no potential for conflict because defendant's waiver related to a case that was not before it. Therefore, contrary to defendant's claim, the requirements of MCR 6.005(F) were met. *People v Portillo*, 241 Mich App 540, 543-544; 616 NW2d 707 (2000).

Finally, defendant has not established that trial counsel actively represented conflicting interests or that an actual conflict of interest adversely affected his lawyer's performance. *Smith*, *supra* at 557. "Such a conflict is never presumed or implied." *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). Here, defendant has not explained how the charges against his uncle were "interrelated" with his own charges. Furthermore, he has not alleged any facts showing that trial counsel altered his trial strategy because he represented defendant's uncle in a separate matter. Accordingly, defendant has failed to establish ineffective assistance of counsel based on an actual conflict of interest.

Defendant also claims on appeal that he was deprived of the effective assistance of counsel because his trial counsel failed to request a specific unanimity instruction with respect to his CCW conviction. Because we have reversed defendant's CCW conviction, this issue is moot.

Affirmed in part, reversed in part.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski
/s/ Christopher M. Murray